

01478

Wm. Masfurther  
Proc. I

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-185455

**DATE:** January 26, 1977

**MATTER OF:** ASC Systems Corporation

**DIGEST:**

1. Record does not support contention that meaningful negotiations were not conducted with protester in case where Air Force resolved doubts about acceptability of protester's initial proposal by including it in competitive range. Ultimate rejection of proposal--on basis of failure to meet technical requirements to extent that major change or redesign of proposal would be needed--is not objectionable in circumstances where Air Force had advised protester of technical deficiencies in both written and oral discussions, protester had three opportunities to revise proposal, and technical judgments of Air Force are not clearly shown to lack reasonable basis.
2. Where record indicates that Air Force had sufficient reasons to reject proposal initially found to be within competitive range--after determining that protester's responses to written and oral discussions indicated that major changes in proposal would be needed--there was no arbitrary and capricious action towards protester, and thus there is no basis to support claim for recovery of proposal preparation costs.

Request for proposals (RFP) No. F19528-76-R-0198 was issued by the Headquarters Electronic Systems Division, Hanscom Air Force Base, seeking the design, fabrication and testing of preproduction models of dual-band radar beacon transponders, with options for up to 800 production units. ASC Systems Corporation (ASC) protests the rejection of its proposal submitted thereunder and requests that it be permitted to resume negotiations. Alternatively, ASC seeks recovery of its proposal preparation costs, contending that the Air Force arbitrarily and capriciously denied it the opportunity, required by paragraph 3-805.3(a) of the Armed Services Procurement Regulation (ASPR) (1975 ed.) and 10 U.S.C. § 2304(g) (1970), to engage in meaningful discussions regarding its proposal. Award has been made under the solicitation.

Several proposals were received under the RFP and were initially evaluated by the Source Selection Evaluation Committee (SSEC). As regards ASC's proposal, the contracting officer reportedly determined that there was substantial doubt whether or not the proposal was within the competitive range. However, he initially included ASC therein, because the possibility existed that the ASC proposal had been initially rated as marginal and unacceptable simply because its lack of detailed design data did not permit the SSEC to determine what was actually being offered. Thus, the contracting officer decided to conduct negotiations in the hope that ASC could demonstrate that its proposal had a reasonable chance of being selected. This decision was made in view of the direction in ASPR § 3-805.2 that "When there is doubt as to whether a proposal is within the competitive range, that doubt shall be resolved by including it."

Accordingly, by letter dated April 20, 1976, ASC was advised that:

"1. Your proposal \* \* \* has been evaluated and an initial determination made that it is within the competitive range.

"2. Your proposal evidenced deficiencies in some areas and lack of clarity in others. Those aspects of your proposal are enumerated in attachment 1 to this letter \* \* \*

\* \* \* \* \*

"4. If you elect to correct the deficiency or deficiencies you must determine and explain, in your response, the impact of correction both in terms of gains in acceptability achieved through corrective action and the degradation which may occur to other parts of the proposal, including risks of accomplishment, operational usefulness, schedule, and cost/price. \* \* \*

"5. Any response or lack of response in this matter will have a bearing on your participation in the competitive procurement."

The Air Force's report to our Office further notes that attachment No. 1 to the letter instructed ASC to "provide clarifying and/or supplemental information regarding \* \* \*" various areas of its proposal, and for each area set forth, when applicable, the pertinent sections of the Instructions for Proposal Preparation, the Statement of Work, the specification, and the ASC proposal. To a large degree, broad, general areas were addressed in the attachment, rather than specific questions regarding each area, since the technical evaluators apparently did not feel that they had enough information to formulate more specific questions.

ASC timely responded to the April 20 letter and attachment by submitting additional information. This response was evaluated by the SSEC and was found to resolve some of the areas of concern. However, on the whole it was determined to be unsatisfactory due to lack of comprehensive design data and analysis. Deficiencies were found to still exist in those areas relating to antenna design, antenna ripple effect, and receiver and mechanical design, including signal-to-noise and other requirements.

It is further reported that by letter of May 11, 1976, ASC and the other offerors whose proposals were within the competitive range were invited to participate in oral discussions with procurement officials--in the case of ASC on May 21--and were requested to respond in writing to the attached lists of technical questions and comments. At the May 21 ASC meeting, oral discussions were conducted regarding all aspects of the ASC proposal, with special emphasis placed on those previously identified deficiencies and areas where information was lacking or inadequate. At the close of the meeting, ASC was informed, according to the Air Force's account, that if elaboration relative to its responses was deemed necessary, the contracting activity would submit further written requests for information. It is stated that the activity personnel made no commitment that another request for information would definitely be forthcoming.

Following the completion of oral discussions with all the offerors, the SSEC reevaluated each proposal, taking into consideration the results of the oral discussions and a review of the supplemental informational submissions made. The results were that ASC, as well as other offerors, was determined to have submitted a technically

unacceptable proposal. In ASC's case, this was due to critical deficiencies and omissions that were felt to still exist. The Air Force believed that the responses of ASC on the whole indicated a lack of understanding of the requirements and that they provided no assurance that ASC could meet those requirements. The contracting officer reviewed these findings and tentatively concluded that ASC would be unable to correct its proposal deficiencies without making major changes in the proposal, that it appeared ASC no longer had any reasonable chance of being selected for award, and that the ASC proposal should therefore be eliminated from the competitive range. Price, while not controlling, was also considered before reaching this determination.

Notwithstanding this tentative determination, the contracting officer decided to send amendment No. 0003 to the solicitation (a clarification of certain aspects of the procurement found to be necessary as a result of the oral discussions) to all offerors prior to making a final competitive range determination. ASC responded to the amendment, but, in the Air Force's judgment, did not revise its proposal so as to correct the deficiencies that existed. In accordance with ASPR § 3-805.2(a), the contracting officer then advised ASC, by letter of June 25, 1976, that its proposal was no longer considered in the competitive range and that no further negotiations would be conducted with it. The reasons given ASC for the rejection of its proposal may be summarized as follows:

1. antenna design will not meet requirements due to generation of excessive ripple,
2. receiver design will not meet requirements due to proposed signal-to-noise ratio and signal-to-noise ratio required to meet beacon set probability of detection and false alarm rate,
3. beacon set weight will not meet requirements due to lack of consideration of weight of two receiver/transmitter modules in proposed weight analysis, and
4. lack of sufficient, comprehensive data or detailed design analysis data to justify and verify proposed configuration for dual-band beacon or to permit contracting activity to adequately evaluate suitability to requirements.

ASC argues, as aforementioned, that it was treated in a manner which constituted a denial of its right as an offeror within the competitive range to engage in meaningful discussions regarding its proposal. First, ASC contends that the April 20 letter, with its attached list of questions, did not identify any areas in which the ASC proposal was deficient. Instead, ASC believes that the contracting activity merely requested clarifying information for the areas identified. This information was supplied, ASC believes, in exhaustive detail. Further, ASC argues that the contracting activity was significantly "persuaded by the thoroughness and competence" of the ASC approach, as illustrated by the failure of the activity after the April 20 letter to request "further clarification of any portion" of the ASC proposal addressed in that letter, other than those two areas dealt with under questions "(c)"--antenna pattern ripple, and "(g)"--receiver design and employment of TDA's in both bands including sensitivity, S/N and false alarms. Indeed, ASC contends that "none of the forty odd original questions, other than the antenna and the noise, was assigned as reasons for rejecting the Protestor's proposal."

As regards the first reason for rejection, ASC states that it never was informed that this was a deficiency, and contends that it did adequately clarify this area with exhaustive data showing that the antenna ripple would not exceed 1.5db, or one-half the activity upper limit of 3db. As for the second reason, it is contended that ASC--in its clarifying information and during the oral discussions--adequately showed how much receiver noise would exist (the specification allegedly contained no upper limit on this), how it would be controlled, and that the resulting signal-to-noise ratio would be such that the proposed receiver design would meet the 0.99 transponder response probability requirement. At no time during the oral discussion, ASC states, did the activity personnel advise ASC that its proposal was deficient in this area.

The third reason for rejection is felt to be the most harsh and most arbitrary and capricious of all. Cognizant ASC personnel have submitted affidavits stating that during the oral negotiations they admitted that the weight of the two receiver/transmitter modules had been left out of the beacon set weight analysis. Allegedly, this was a mere clerical error. The ASC personnel have stated that they offered to recalculate the matter at that moment. However, they did not, because Air Force representatives stated that the correction could be made in furnishing written answers to further clarification questions which the Air Force was to send. ASC states that it never received further questions from the Air Force.

B-186865

Finally, as regards the fourth reason for rejection, the absence of suitable/sufficient data to evaluate the suitability/acceptability of the proposed dual-band beacon configuration, ASC contends that this reason "had never been discussed in any form with the Protestor."

ASC points out that it was advised by the April 20 letter that it was within the competitive range for this procurement. The protester observes that the "competitive range" has been defined to include all proposals "which have a reasonable chance of being selected for award," ASPR § 3-805.2(a), and/or which are not "so materially deficient that" they "could not have been made acceptable through minor revisions or modifications." 51 Comp. Gen. 431 (1972). ASC believes that exclusion from the competitive range is sanctioned only where the proposal is so deficient that the Government's requirements can be satisfied only through a complete revision of the cost and technical proposals, citing 51 *id.* 431. The inclusion of ASC within the competitive range was thus consistent, it is alleged, with the fact that ASC was never advised that its proposal contained any deficiencies (as opposed to matters merely requiring clarification). The truth of this assessment of the situation is, it is felt, further buttressed by the fact that of the four reasons given for rejection, two--those concerning the antenna ripple and the receiver signal-to-noise ratio--were never listed as deficiencies prior to the rejection, one--the weight error regarding the module--may have been a deficiency but could have been easily corrected had the activity permitted the requested correction, and the fourth--insufficient data regarding configuration--was never discussed in any form.

In view of the above, ASC believes that the failure to conduct meaningful negotiations is apparent. Out of the approximately 170 areas involved in formulating a proposal, only four questionable areas existed, and of those only one may be possibly classified as a deficiency. ASC points out that its original proposal was not "so materially deficient that it could not have been made acceptable through minor revisions or modifications," that ASPR § 3-805.3(a) requires an offeror to be advised of any proposal deficiencies and to be given a reasonable opportunity to correct such, and that the reason for negotiations after an offeror is found to be within the competitive range is to permit a meaningful dialogue leading to an upgrading of that proposal (citing *Raytheon Company*, 54 Comp. Gen. 169, 177 (1974), 74-2 CPD 137). Accordingly, ASC believes there can be no doubt that by not permitting further clarifications and the submission of a best and final offer the contracting activity was derelict in its duty to negotiate meaningfully with ASC.

Lastly, it is noted that if ASC cannot be given the opportunity to resume negotiations despite the failure of the activity to conduct meaningful negotiations, our Office has held that the Government is under an obligation to fairly and honestly consider all bids or offers submitted to it in response to a solicitation, and if it does not meet this obligation and instead rejects a bid/offer in an arbitrary and capricious manner, the disappointed bidder/offeror is entitled to recover its bid/offer preparation costs. T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. ASC states that its extensive proposal preparation effort, costing between \$30,000-35,000, was wasted by the contracting activity's failure to reasonably and fairly conduct negotiations. In particular, by inducing ASC to refrain from correcting the weight error, by promising the opportunity to correct it, and then by using that very error as a justification for proposal rejection, the contracting activity perpetrated an action that, it is contended, can only be termed as arbitrary and capricious. Further, ASC notes that of the four circumstances, all or some of which may constitute proof of arbitrary and capricious action, as outlined in Keco Industries, Inc. v. United States, 492 F.2d 1200 (1974)—subjective bad faith, no reasonable basis for the agency action, stronger proof is required the broader the discretion residing in the official whose action is contested, and possible effects of the violation of a statute—none may be said to bar recovery in this instance, and each would tend to support a claim for proposal preparation costs.

We are not persuaded by ASC's arguments. Initially, regarding the allegation that ASC was not informed by the April 20 letter that its proposal contained deficiencies, we note that the letter stated: "Your proposal evidenced deficiencies in some areas \* \* \*" and "If you elect to correct the deficiency or deficiencies \* \* \*." Also, the language "provide clarifying and/or supplemental information" is used, thereby suggesting that "supplemental information" is something more than mere "clarifying" information. While each area questioned was not designated as "deficient" or "nondeficient," it is clear that ASC was advised that deficiencies existed in its proposal. Further, where a proposal lacks sufficient detail as to how requirements will be met, a request for additional clarification, amplification and discussion may be sufficient to place the offeror on notice that deficiencies exist in its proposal. See, in this regard, General Exhibits, Inc., B-182669, March 10, 1975, 75-1 CPD 143.

Next, the contention that none of the questions raised in the April 20 letter, with the exceptions of questions "(c)" and "(g)," was ever raised again by the contracting activity is incorrect. A perusal of the April 20 and May 11 letters shows, at minimum, that various areas were questioned in both letters: "(b)" in the former letter and "2," "3," and "4" in the latter (mechanical design); "(e)" and "5" (AGC); "(h)" and "6" (Band I and II Delay Time); and "(k)" and "9" (DT&E Test Program). As regards the contention that none of the original questions, except "(c)" and "(g)," was assigned as a reason for rejecting the ASC proposal, question "(b)" in the attachment to the April 20 letter requested more information dealing with the "Mechanical design including layout and size allocation," and the May 11 letter also contained various questions regarding design of the various portions of the beacon. From reading of paragraph 2.1 of the ASC proposal, the portion of the proposal referenced by question "(b)," this question (and those of similar nature in the May 11 letter) would appear to dovetail neatly into the fourth reason given for the ASC proposal rejection.

Finally, as regards ASC's contention or inference that once a determination--albeit "initial"--has been made to categorize a proposal as within the competitive range, the contracting activity must proceed with that offeror up to and through the receipt of a best and final offer, we must note that ASC's initial proposal was included within the competitive range because the Air Force's doubts as to its acceptability were resolved in ASC's favor. Concerning such proposals, we stated in Operations Research, Inc., 53 Comp. Gen. 860 (1974), 74-1 CPD 252:

"\* \* \* Accordingly, in those situations where discussions relating to an ambiguity or omission make clear that a proposal should not have been in the competitive range initially, we believe it would be proper to drop the proposal from the competitive range without allowing the submission of a revised proposal."

Also, we note that while ASC's proposal was rejected prior to the submission of best and final offers, ASC nevertheless had been given several opportunities to revise its proposal before it was rejected.

As for the Air Force's technical judgments, we must note that determinations of this kind are primarily the function of the contracting activity, and the activity's technical evaluations will not be questioned by our Office absent a clear showing that they are without a reasonable basis. Ohio State University; California State University, B-179603, April 4, 1974, 74-1 CPD 169; RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. We find no grounds in this case for concluding that the technical evaluation of the ASC proposal has been clearly shown to lack a reasonable basis.



B-186865

Section D, "Evaluation Factors For Award," in the solicitation General Instructions, outlined the evaluation criteria that would govern in evaluating proposals. All criteria were listed in the order of their relative importance. They were listed, in part, as follows:

"1.1 Operational/Technical

- a. Functional Performance
- b. Reliability and Maintainability
- c. Test Planning/Approach
- d. Technical and Schedule Risk
- e. Battery Selection

"1.2 Cost/Price

★ ★ ★ ★ ★

"1.3 Production/Management

★ ★ ★ ★ ★

"1.4 Logistics"

From the record provided our Office, each proposal was evaluated in accordance with these criteria.

As regards the evaluation of ASC, the following appears to have occurred. Concerning the mechanical design of the beacon, the ASC proposal was, due to the fact that the beacon operated on its side, assessed as most probably offering poor stability and poor water-tight integrity and as offering a design and orientation that would result in secondary battery problems. Hence, by the April 20 letter, ASC was requested to address these problems by answering question "(b)." The ASC response was rated as unsatisfactory. The location of many of the components was not shown. The final location of each internal module was proposed for the design phase, and electromagnetic interference problems were envisioned. As a result of these conclusions, the design approach was not considered firm, and sufficient data and analysis were adjudged to be lacking. The questions in the May 11

letter put to ASC regarding this area of its proposal resulted in little change in the evaluation. The beacon was noted not to be totally water-tight, and its on-side orientation remained the same with the resulting same high risk assessment and possibility of poor performance. The weight breakdown was found to be in error because not all elements of the module had been considered. The basic assessment was thus that the mechanical design was risky, would lead to operational difficulties, and would require a major design change before it would meet the solicitation requirements. Also, the Air Force believed that electromagnetic interference problems still existed.

As for the receiver and transmitter design, the evaluation of the original proposal showed inadequate support for the need to use a two-stage TDA in Band II. Transponder response time was not adequately supported by detailed design data and analysis, and delay times required clarification and detailed data. Clarifying and/or additional data was requested in the April 20 letter. Some of the ASC responses to the April 20 questions were satisfactory and eliminated the need for additional data. However, the responses to the AGC and receiver design inquiries were regarded as simply repeating the original proposal's contents and as showing a lack of understanding of the requirements. The ASC response on delay times was felt to be inadequate because it addressed only nominal delays and none of the other possible variations. Also, no consideration was given by ASC to variations in signal level, pulse rise time, or service conditions. Thus, the Air Force concluded that these areas involved "high risk." Assessment of ASC's response to the May 11 questions regarding these areas did little to improve its position; the response to the AGC design was considered satisfactory, but the response to the delay times was still considered unsatisfactory. Sufficient design and technical data were felt to be lacking. The ASC response on random noise triggering revealed the proposed receiver design to be noncompliant with the specification to the extent that correction would entail a major change in the proposed design.

Regarding the antenna design, the Air Force assessed the original design as unworkable, as not meeting the specified ripple, and as having an excessive quadrature combiner loss. The quick disconnect feature was of inadequate design and of high risk. The ASC response to the April 20 questions regarding this area was considered unsatisfactory, except for the clarification of the quadrature combiner loss. Data was felt still to be lacking on the securing of the antenna to

B-186865

the beacon set, on the operation of the proposed thumb wheels under arctic conditions, and on the storage of the weather proofing boot to prevent its loss during operational usage. The Air Force believed the ripple response proposed to be inadequate and of high risk. Responses to the May 11 letter did not change the evaluation results. The quick disconnect mechanical interface had been modified in design but was still regarded as unsatisfactory and of high risk. The response to the antenna ripple was rated as unsatisfactory because it contained unacceptable calculation errors. The antenna design was assessed as unworkable; the Air Force regarded the ripple deficiency as such that it could be cured only by a major change in the proposed antenna design.

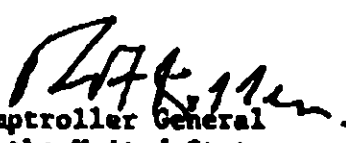
We believe it clear from the record that throughout the procurement certain areas of the ASC proposal were causing the contracting activity particular concern. The weaknesses and deficiencies in these areas created, in the Air Force's judgment, a high risk that ASC's proposal would not meet the activity's needs. Critical portions of the specification were not complied with, and compliance required--at least it so appeared as the ASC proposal took shape--major redesign of the item ASC was offering. This conclusion, while not immediately apparent from the material in the original proposal, became more and more concrete as the ASC proposal evolved. While the negotiations did resolve some problems, they also clearly brought out what the Air Force viewed as very basic deficiencies that the ASC proposal contained. It must be noted that ASC's deficiencies related to the evaluation factor listed as most important in the RFI--i.e., Operational/Technical considerations.

ASC argues that had more clarification of the proposal been requested--and it is believed that the activity was under a duty to make such requests--ASC would have been able to finally present an acceptable proposal. In this regard, the alleged failure of the activity to permit ASC to correct the beacon set weight is noted. The Air Force report to our Office advised that the ASC answer to question 10 of the May 11 letter, confirmed by ASC during the oral negotiations, showed the electronic module was equal to the specification weight limitation. The Air Force evaluators determined that the addition of the weight of two receiver/transmitter modules could only cause the weight limitation to be exceeded. Thus, the difficulty with the proposal would appear to be not a clerical problem but rather a design problem. The Air Force decided that there was no need to ask for further computations from ASC.

There is a factual dispute as to what ASC was told in the oral negotiations concerning the "overweight" problem. In any event, we do not believe that the Air Force arbitrarily prevented ASC from correcting the deficiency in its proposal. ASC had an opportunity to revise its proposal in connection with furnishing its June 23, 1976, response to RFP amendment No. 0003, wherein ASC discussed a number of technical points dealt with in the amendment. Even if it is assumed that the Air Force did in fact tell ASC that a further list of questions would be forthcoming, we have difficulty seeing why ASC did not respond to the weight problem on its own initiative, particularly since it was ASC's obligation to demonstrate the acceptability of its proposal and since ASC had been twice alerted (in the May 11 letter and the May 21 oral negotiations) to the fact that a weight problem existed. These observations would apply with even greater force if correction of the weight problem was a simple clerical matter, as ASC alleges. Also, we are inclined towards the view that notwithstanding this question, the other ASC deficiencies established sufficient grounds to justify rejection of the proposal.

In sum, the Air Force conducted both written and oral discussions and gave ASC three opportunities to revise its proposal. It must be noted that what will constitute meaningful negotiations/discussions is a matter of judgment that is primarily for determination by the procuring activity in light of all the circumstances of the particular procurement and the requirement for competitive negotiations. 53 Comp. Gen. 240 (1973). Also, we have held that a proposal may be excluded from the competitive range where informational and other deficiencies preclude the upgrading of the proposal to an acceptable level without major revisions. 52 Comp. Gen. 865 (1973). See, also, Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232, where the rejection of a proposal found initially to be within the competitive range was unobjectionable because major revisions would have been required to make the proposal acceptable. In view of these guidelines and all the facts of this case, we do not believe the procuring activity's actions were unreasonable or objectionable.

In view of the foregoing, the protest is denied. Since we have concluded that sufficient reasons existed to permit the rejection of the ASC proposal, it would logically follow that there was no arbitrary or capricious action toward the protester, and, thus, that there is no basis to support the recovery of its proposal preparation costs.

  
Deputy Comptroller General  
of the United States